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Date: <u>2/12/2010</u>	
Time: <u>1:30 PM</u>	
Judge/Calendar: <u>Honorable</u>	
Anne Hirsch	

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

WESTERN WATERSHEDS PROJECT and
DR. STEVEN HERMAN,

Plaintiffs,

v.

WASHINGTON DEPARTMENT OF FISH
AND WILDLIFE; JEFFREY P. KOENINGS,
WDFW Director; and JENNIFER QUAN,
WDFW Lands Division Manager,

Defendants.

Nos. 08-2-00276-1 & 09-2-01120-3
(Consolidated Cases)

**PLAINTIFFS' OPENING BRIEF ON
PETITIONS FOR JUDICIAL REVIEW**

INTRODUCTION

In these consolidated actions, Plaintiffs Western Watersheds Project *et al.* (“WWP”) challenge several decisions by Defendants Washington Department of Fish and Wildlife *et al.* (“WDFW”) to allow ecologically harmful livestock grazing in State Wildlife Areas, without conducting any environmental review under the Washington State Environmental Policy Act (“SEPA”) and in violation of WDFW’s statutory duties to preserve and protect wildlife.

This Court (per Judge Wickham) has already ruled for Plaintiffs on the first of their claims, holding that WDFW violated SEPA in not conducting any environmental analysis before issuing a

2008 grazing permit for the Quilomene/Whiskey Dick Wildlife Area. *See* January 28, 2009 Decision (No. 08-2-00276-1).

Plaintiffs now ask the Court to rule for them on their remaining claims, which challenge a 2008 Memorandum of Understanding (“MOU”) that WDFW’s former Director Jeffrey Koenings signed with the Washington Cattlemen’s Association to promote livestock grazing in State Wildlife Areas; and a 2009 permit issued by WDFW under that MOU, which authorizes grazing in the Asotin Wildlife Area of southeastern Washington – an area that is home to endangered salmon, steelhead, and other imperiled fish and wildlife species.

As the record before the Court shows, WDFW biologists as well as Plaintiffs’ scientists expressed strong – even vehement – opposition to allowing the proposed livestock grazing in State Wildlife Areas, including Asotin, because of the degradation that livestock cause to streams and uplands habitats, thus harming fish and wildlife populations. Yet WDFW managers ignored and even suppressed these scientific views, in order to favor the livestock industry.

By overriding WDFW’s own scientists to authorize environmentally destructive livestock grazing in Asotin and other State Wildlife Areas, Defendants thus acted in an arbitrary and capricious manner, and violated their statutory duties to preserve and protect the state’s fish and wildlife resources.

Moreover, despite the warnings of WDFW’s own scientists that grazing poses many harmful impacts to fish and wildlife resources, Defendants never conducted any public environmental review of the MOU or the Asotin permit, thus violating SEPA.

Accordingly, the Court should reverse and remand both the MOU and the Asotin permit under the Administrative Procedure Act, SEPA, and other requirements of law discussed below.

STATEMENT OF FACTS

Livestock Industry Efforts To Graze In State Wildlife Areas.

This case traces back to August 2005, when Washington Governor Christine Gregoire wrote to WDFW Director Koenings saying that she had recently met with the Washington Cattlemen’s Association (“WCA”) about promoting livestock grazing on State Wildlife Areas. *See MOU AR 3* (Gregoire letter).¹ The Governor encouraged Koenings to have WDFW provide the ranchers with “expanded opportunities to demonstrate how grazing techniques can be utilized on wildlife lands to promote desirable conditions.” *Id.*

After several months of meetings with ranching interests,² Director Koenings executed a “Memorandum of Understanding” between WDFW and the WCA in November 2005. *See Asotin AR at 810* (MOU); *Asotin AR 339* (status report discussing MOU). The public was never given notice of these meetings; nor did WDFW undertake any SEPA review before approving the MOU. Moreover, Koenings apparently did not even solicit input of WDFW’s own scientists before agreeing to the MOU, since there is no indication of such consultation in the record.

Yet the MOU was adopted expressly to expand livestock grazing in State Wildlife Areas to provide economic support for the ranching industry, through use of so-called “pilot grazing” projects. *Asotin AR at 810*. Moreover, under the MOU, WDFW abdicated significant responsibility for managing livestock grazing on state lands to the WCA – including authority to select the

¹ Because Defendants have filed several sets of Administrative Record materials, this brief refers to the record for the challenged MOU as the “*MOU AR*,” and the record for the Asotin permit as the “*Asotin AR*.” Plaintiffs are also providing the Court with key record documents in the accompanying “Plaintiffs’ Excerpts of Record,” to facilitate the Court’s review.

² The largely private meetings continued through 2009, under the auspices of the “WDFW-WCA Grazing Committee,” as evidenced by numerous meeting notes in the record. *E.g. MOU AR at 23, 24; Asotin AR at 264, 297.*

ranchers to graze the state lands. *Id.* at 812. Again, WDFW agreed to these provisions without any public input or involvement, and without any environmental analysis under SEPA.

The Asotin Wildlife Area.

The Asotin Wildlife Area is located in the southeastern corner of Washington; and is named after its principal stream, Asotin Creek, which is a tributary to the Snake River. *See Asotin AR at 3464* (map of area). The area is very steep, particularly around Pintler Creek (a tributary to Asotin Creek), where slopes are 45 to 60 percent. *Asotin AR at 700* (2007 status report).

Asotin Creek, Pintler Creek, and other tributaries are critical habitat for three fish species listed as “threatened” under the federal Endangered Species Act (“ESA”): Snake River steelhead, chinook salmon, and bull trout. *See* Defs’ Answer in No. 09-2-01120-3, ¶ 10. Reflecting the ecological importance of this area, the State of Washington has designated the Asotin Creek drainage as a “wild steelhead refuge.” *Id.*

The Asotin Wildlife Area is also home to many wildlife species, including bighorn sheep, mountain quail, elk, and deer. *Id.*, ¶ 11. Mountain quail is an imperiled bird that WDFW has attempted to reintroduce onto the Wildlife Area. *Id.* Several species of rare plants are also present, including a large population of Spalding’s catchfly (also protected under the ESA) and the Nez Perce mariposa lily. *Id.*, ¶ 12.

WDFW acquired the lands in the Asotin Wildlife Area at different times. *Asotin AR 3460-73* (management plan describing acquisition history). Significant funding was provided by the federal Bonneville Power Administration as “fish and wildlife mitigation” for the Columbia River dams, including funds to acquire the Smoothing Iron portion of the area. *Id.*

The state goals of the Asotin Wildlife Area’s management plan are to “preserve habitat and species diversity for both fish and wildlife resources, maintain ecologically healthy populations of

game and non-game species, protect and restore native plant communities, and provide diverse opportunities for the public to encounter, utilize, and appreciate wildlife and wild areas.” *Id. at 3458*. With respect to grazing, the management plan specifies that “[t]he forage nutrition needs of wildlife will be allotted first, and where appropriate (i.e. no rare or listed plant/fish/wildlife species impacted, no environmental concerns present such as highly eroded soils, etc.), surplus forage will be considered for use in grazing permits that can be shown to benefit wildlife.” *Id. at 3538* (emphasis added). Thus, the agency is to prioritize the needs of fish and wildlife above commercial activities such as livestock grazing.

WDFW Scientists’ Concerns About Grazing In The Asotin Wildlife Area.

Until the events at issue here occurred, WDFW managed the Asotin Wildlife Area to promote salmon, steelhead, and other fish and wildlife values; for instance, no livestock grazing was allowed in Pintler Creek after 1990. *Asotin AR at 342* (2007 status report). Yet under the 2005 MOU, WDFW promptly authorized ranchers to graze livestock – for free – on large portions of the Asotin Wildlife Area, causing serious ecological degradation.

Specifically, WDFW identified Pintler Creek as the first “pilot area” for grazing in the Wildlife Area, and permitted rancher Tom Hendrickson to graze livestock there in 2006 through the use of “temporary” grazing permits. *Asotin AR 49* (grazing plan) & *3414-15* (temporary permits dated 4-24-06 and 5-26-06). In 2007, WDFW approved a two-year grazing permit and plan for Pintler; as well as a three-year permit and plan for a second area known as Smoothing Iron. *See Asotin AR 48-59, 84, 605–610 & 28*.

Notably, these plans were drafted by WCA ranchers and Asotin Wildlife Manager Bob Dice in order to satisfy the ranchers’ desires – not the needs of salmon, steelhead, or other sensitive species. *See Asotin AR at 3706 & 3711* (Dice memos stating “Cattlemen would be developing the

grazing plan,” and warning WDFW biologists that their recommendations would not be “cast in stone,” but must be acceptable to WCA).

WDFW’s regional biologists – collectively known as the District Team – raised serious concerns about these grazing plans, including that they were based on political pressure rather than science; the purported goal of the plans to improve fish and wildlife habitat would not be achieved by the proposed grazing; the number of livestock and degree of “utilization” proposed were far too high; no scientifically defensible monitoring plan was included; and they were given far too little time to review the plans.³

For example, at a February 2007 meeting over the draft plans, one member of the District Team questioned if there was any way to address wildlife concerns yet “save face with the political pressure?” *Asotin AR at 14*. When the team members asked why WDFW selected a rancher with a poor reputation, Manager Dice responded that the “[c]attlemen selected the grazers.” *Id.* Team members also expressed concerns that “we are doing the opposite of what we are recommending other [landowners] to avoid,” that they had “not been more involved in this process at an earlier stage,” and that their objections had “not been openly received.” *Id.*

Similarly, a January 2007 memo from the Area Habitat Biologist advised that two of the stated goals of the grazing plans – to “reduce the abundance of weed species,” and to “remove large accumulations of dead plant material and promote more nutritious regrowth” – did not make sense, and would not be achieved by the plan. *Asotin AR at 1*. *See also id. at 3832* (biologist memo stating similar). He also commented that the plan’s proposal to allow “50% utilization before the

³ Documents raising these concerns include *Asotin AR 1* (Area Habitat Biologist memo); *AR 3* (Wildlife Biologist memo); *AR 11* (District Team meeting notes); *AR 22* (Wildlife Biologist memo); *AR 25* (Fish Biologist email); *AR 37* (Wildlife Biologist memo); *AR 43* (District Team memo); *AR 3707* (Wildlife Biologist memo on Smoothing Iron plan); *AR 3712* (Wildlife Biologist email); *AR 3754* (email from Wildlife Biologist); *AR 3832* (biologist memo).

critical wintering time for wildlife” was “not biologically justifiable.” *Id. at 1–2*. And several memos from the District Wildlife Biologist emphasized that grazing utilization should be limited to 20–25% of annual forage (plant growth), with no grazing allowed in any pasture during May 15–June 15 to avoid impacts to calving elk – measures that were not included in the plans. *Asotin AR at 6, 24, 40*.

The Team’s Fish Biologist was alarmed at the failure of the plans to protect ESA-listed fish species. He stated that the “[f]ish management and habitat management [departments] should have been fully involved in the development and oversight of this plan.” *Asotin AR at 25*. He explained that “I am worried about the use of pastures along Pintler and South Fork Asotin [which contain steelhead habitat] when hot temperatures may force cattle into those areas for shade, water and vegetation. I see little in the plan to suggest that riparian areas will be adequately monitored or protected.” *Id. at 26*. He added that “[t]he monitoring plans as described are weak or incomplete with very little detail.” *Id. at 25*.

Plaintiffs, too, provided WDFW with scientific information about harm the proposed grazing would cause. For example, WWP biologist Katie Fite informed WDFW that “[t]here is a significant body of wildlife science that shows elk and other big game being disturbed and displaced by cattle, rather than benefiting from grazing activity,” as well as impacts to other wildlife and native plants, and provided extensive scientific citations. *Asotin AR at 191–201*. She warned that grazing was a major threat to an ESA-listed plant, Spalding’s Catchfly, found in the Wildlife Area. *Asotin AR at 175–76*. She explained that disturbance from livestock spreads weeks, *id. at 196*; and fencing and water developments—intended to distribute cows—harm wildlife. *Asotin AR at 212–13, 252–54*. WWP member and fisheries scientist Dr. Donald Johnson documented the risks to ESA-listed fish. *E.g. Asotin AR 3930, 3933*.

WDFW's managers soundly rejected these scientific concerns in approving the grazing plans sought by WCA. For example, both the Pintler and Smoothing Iron grazing schedules (April 1–May 31 and April 15–October 31, respectively), *Asotin AR 52 & 30*, directly contradicted the District Wildlife Biologist's repeated warnings that grazing should not occur following May 15 to avoid impacts to calving elk. *Asotin AR at 6, 24, 40* (biologist memos). The plan contained no limitations on livestock utilization, even though the biologists warned that use had to be limited to 20–25%. *See Asotin AR at 30–31, 52* (plans). And despite the Team's concerns about impacts to fish, the plans contained no aquatic monitoring provisions or protections – other than a vague assurance that the permittee “will be responsible for frequent riding to prevent livestock use of sensitive areas.” *Id. at 52–53*. The plan also provided for WDFW to install new fencing, *id. at 52*, but contained no analysis of the environmental impacts of such fencing. And the plans contain no analysis of livestock's spread of weeds.

Grazing Damage In Asotin Wildlife Area.

Unfortunately, the biologists' concerns were well-founded: according to WDFW's own documentation, grazing has already caused significant ecological degradation in the Asotin Wildlife Area.

This damage began as soon as WDFW authorized grazing in 2007, when – based on a “misunderstanding on the part of the operator” – rancher Hendrickson placed 200 more cows on the Pintler area than allowed. *See Asotin AR at 345* (draft status report). Cows in Pintler and Smoothing Iron proceeded to enter and damage creeks containing ESA-listed steelhead and salmon, despite the plans' assurances that the ranchers would prevent cows from entering riparian areas; and caused such severe degradation that even Manager Dice acknowledged that the cows were “presenting problems for listed stocks of fish” and caused “cattle damage to the riparian

[area] and stream banks” of Pintler Creek. *Asotin AR* 582 (Dice memo) & 3886 (weekly report).⁴ WDFW thus hurriedly erected miles of new fencing in both areas and several new water troughs and pipelines – again, without any SEPA review, despite the impacts that fencing and water developments pose for wildlife. *See Asotin AR at 582, 584* (2008 Grazing plan amendment).

Moreover, 2007 grazing use levels far exceeded the benchmarks recommended by the biologists. Field notes document widespread overuse by cows and rampant trespass in the riparian areas. The Wildlife Biologist noted in June 2007 that “[t]he heavy grazing is creating a perfect condition for weeds, and putting severe stress on native grasses”; that areas near water tanks were “trashed, right down to the dirt,” and the goal of the project to remove “dead grass” to assist deer and elk failed, as even in areas of high use, “most of the ‘old dead grass’ is still there or trampled.” *Asotin AR at 3940, 3941* (emails). *See also id. at 3950* (grazing leaving area “much more susceptible to weed invasions”). In a September 2007 tour, the District Team “noticed how cattle had concentrated in riparian zone[s],” with severe utilization of up to 80% in riparian zones in Pintler and on ridgetops on Smoothing Iron. *Asotin AR at 284–85* (tour notes). The team expressed concern about the “ability to meet vegetative objectives due to cattle concentrating in riparian areas and the few gentle slopes,” and asked: “Why weren’t cattle removed on riparian and pastures when [the] benchmark for utilization was hit early in the grazing period?” *Id.* The Habitat Biologist noted that “it appears the grazing plan was designed to accommodate the needs . . . of the permittee, rather than for wildlife benefits.” *Id.* As WDFW continued to build new fences and

⁴ Despite these serious breaches of the permit and plan requirements, and WDFW’s assurances of permit cancellation in the case of permittee noncompliance, *e.g. Asotin AR at 605* (permit), *MOU AR at 40* (2008 MOU), WDFW simply permitted the rancher to move his cows to another pasture, Kelly Creek, where they quickly caused similar problems. *Asotin AR at 3920, 3929* (emails reporting 70 and 40 pair of cows in the Kelly Creek riparian area).

water developments for livestock, the Fish Biologist “recommended being careful because taking water from springs could impact flows in [Kelly Creek]-Pintler.” *Id. at 285*.

The Nez Perce Tribe visited the site in September 2007 and subsequently expressed concern about the “high degradation to the . . . lands which were evident” during the visit. *Asotin AR at 1062*. Plaintiffs, too, submitted documentation and startling photos of cattle over-use and degradation. *E.g. AR at 1157–65* (letter and photos from Dr. Johnson).

WDFW prepared a draft “Status Report” during the winter of 2007–2008 to assess the success of “pilot” grazing in the Asotin Wildlife Area. *Asotin AR at 332*. Yet the Wildlife Area biologists uniformly excoriated the report for glossing over the many harmful impacts of grazing on the Wildlife Area and underestimating the project’s costs and time.⁵ For example, the Fish Biologist explained that the report failed to acknowledge impacts to salmon and steelhead such as increased sediment and vegetation removal, and impacts of “sacrifice” (heavily used) areas. *Asotin AR at 321–324*. The Area Habitat Biologist noted that – as he had predicted – the stated objective of improving habitat through livestock grazing “did not occur.” *Asotin AR at 389–390*. He also noted that the objective to “keep livestock well distributed at all times” was not met, but that cows concentrated in riparian areas and benches. *Id. at 390*.

The damage continued in 2008, when a “blowout” or mudslide occurred in one of the Smoothing Iron pastures, sending a great deal of sediment into steelhead streams. *Asotin AR 4030* (DT meeting notes) & *1083, 1086* (photos of blowout). The District Team was irate that excessive grazing had once again occurred on steep lands, and implied that grazing contributed to the blowout. *Id.* It noted that utilization was 55 to 60%, far above target; and asked “why are we

⁵ Memoranda criticizing the draft report include: *Asotin AR 389-390* (Area Habitat Biologist); *AR 318* (Fish Biologist email stating costs to fish staff were omitted); *AR 321* (Fish Biologist comments); *AR 326* (Fish Program comments criticizing monitoring and cost analyses).

letting cows on [for] so long and repeatedly exceeding targets?” *Id.* The Fish Biologist expressed concern about the impacts of the additional sediment in Asotin Creek on fry (baby fish) in the creek. *Id.* The team noted that they were “forced to continually repeat the same comments and concerns that have been stated for over a year.” *Id.* at 4032.

In summer 2008, Plaintiffs commissioned a Sedimentation Geologist review of the grazing’s impacts on soils. The resulting report, submitted to WDFW, found that the grazing was causing increased levels of erosion and weed invasion, and that the slopes of the Wildlife Area were too steep and the soils too sensitive to sustain livestock grazing. Attachment A at 8–11.⁶

In fall 2008, a survey discovered many more ESA-listed Spalding’s catchfly plants in the grazing areas than previously known. *Asotin AR at 1552* (survey report). Livestock grazing is known to be one of its primary threats. *Asotin AR 1706* (biological assessment). Also in fall 2008, a researcher discovered ESA-listed bull trout in South Fork Asotin Creek, “the first bull trout documented from this stream in a long time.” *Asotin AR at 1437* (email from Fish Biologist, asking WDFW to incorporate this new information into grazing decisions). Manager Dice appeared alarmed, demanding to know: “Who is Dr. Bennett and when was he electrofishing in South Fork? Was he authorized to do this? Does he work for Utah State University? If not, who is he representing? As for the South Fork itself, as you all know, we’re not grazing the creek.” *Id.* The Fish Biologist explained who the researcher was, and noted that “for fish whatever happens in the headwaters comes downstream as some point.” *Id.*

2008 Renewed MOU And 2009 Asotin Permit.

The 2005 MOU between WDFW and WCA expired, under its terms, in December 2007. Yet even while WDFW’s biologists were voicing these – and many other – concerns about the

⁶ The cover letter and report appear to have been inadvertently omitted from the record.

degradation caused by livestock grazing in Asotin and other State Wildlife Areas,⁷ Director Koenings quietly renewed the MOU with WCA on January 9, 2008. *MOU AR at 38-43.*

As before, Koenings did not provide public notice of this action; nor did he seek input on the renewed MOU from WDFW biologists, the Nez Perce Tribe, or the public. And despite the documented damage to Asotin and other State Wildlife Areas as a result of “pilot grazing” projects under the 2005 MOU, WDFW again refused to conduct any SEPA analysis before entering into the renewed 2008 MOU.

Under the authority of the 2008 MOU, WDFW proceeded to draft new a grazing plan and permit for the Pintler portion of the Asotin Wildlife Area, to replace the expiring 2-year permit issued in 2007. WDFW also entered into a four-year contract with Washington State University (“WSU”) for \$428,000 to conduct monitoring for its grazing activities. *Asotin AR at 1123* (meeting notes). As with the renewed MOU and the prior permits, WDFW did not conduct any environmental analysis under SEPA of the new Asotin grazing permit – despite the extensive record compiled by its own scientists showing that grazing had degraded fisheries and wildlife habitat in the Asotin Wildlife Area, as discussed above, and WDFW managers’ private admissions that such analysis was necessary. *Asotin AR at 1068, 4021.*

Once again, WDFW and other scientists expressed serious concerns about the renewed Asotin permit. *See Asotin AR at 2856* (summary of all comments). For example, the District Wildlife Biologist warned that the proposed plan’s utilization thresholds (up to 40–50%) were far too high, thus allowing livestock to consume far too much vegetation than is safe to ensure wildlife needs are met. *Asotin AR at 2660–61.* He again urged WDFW to adopt a more conservative 20–

⁷ As demonstrated in Plaintiffs’ prior briefings challenging the grazing permit for the Quilomene/Whiskey Dick Wildlife Area, grazing in that area harms greater sage-grouse, a state threatened species, including by removing native plants that are vital nesting and brood rearing habitat.

25% standard, to “provide a margin of safety.” *Id. at 2661*. Based on the prior years’ experience, he noted that one pasture was likely to exceed standards within only 8–10 days. *Id.* He also criticized the plan’s allowance of unlimited cattle use in areas dominated by cheatgrass (a weed), explaining that “in areas dominated by cheatgrass, we should be attempt[ing] to improve ecological condition, rather than grazing without thresholds.” *Id. at 2658*. Manager Dice’s response to the District Wildlife Biologist’s comments was simply: “This is getting to be a headache.” *Asotin AR 2665* (Dice email).

On April 9, 2009, WDFW approved the new Asotin grazing permit, allowing Hendrickson – the same permittee who had violated prior permit terms – to graze the Pintler area for another three years.⁸ Along with the permit, WDFW issued a 2009 grazing plan – the “primary purpose” of which was to “ensure that the objectives of the MOU are realized.” *Asotin AR 3324-27*. The 2009 plan again rejected the WDFW biologists’ recommendations that livestock utilization be limited to 20–25%, setting them at far higher levels of 40–60% use at most sites – levels deemed “not biologically justifiable” by the scientists. *Id. at 3352; Asotin AR at 1–2* (50% utilization).

The plan also wholly failed to address the longstanding concerns raised by agency and outside scientists regarding fencing and water developments. The plan admitted that, in the Pintler area alone, WDFW has constructed 26,000 feet (or almost five miles) of fencing, 16,000 feet (2.8 miles) of pipeline, and five troughs. *Asotin AR 3350*. Yet this plan never analyzed or addressed the impacts of the fencing on wildlife movement, erosion caused by livestock trailing along fencing, impacts of installing the pipeline, or the impact of pumping water from streams supporting ESA-

⁸ With this permit WDFW took back assurances made regarding length of the pilot program and cost recovery. WDFW had identified each grazing site as a three year venture. *Asotin AR at 3539* (management plan). However, the 2009 permit extended the grazing three more years, to six years total. *Id. at 3408*. WDFW had also stated “[i]f the pilot project is successful in meeting the goals and objectives of this plan, WDFW will establish the normal grazing permit fee structure in 2009.” *Id. at 52* (2007 plan). However, the 2009 permit is once again free to Hendrickson. *Id. at 3408*.

listed fish to the new troughs. And the plan contains no consideration of weeds, despite comments from biologists that livestock increase weed spread through disturbing the soil. *Asotin AR 1, 3950*.

Status Of This Litigation.

In the first of these two consolidated cases, No. 08-2-00276-1, Plaintiffs Western Watersheds Project (a leading conservation group on grazing issues) and Dr. Steven Herman (an ornithologist and professor emeritus at Evergreen State College) challenged the 2008 MOU shortly after it was approved by Director Koenings. They later amended that complaint to challenge WDFW's issuance of a 2008 grazing permit for the Quilomene/Whiskey Dick Wildlife Area. The litigation initially focused on the validity of that permit, which Judge Wickham held unlawful under SEPA in his January 28, 2009 opinion. His opinion expressly did not rule on the validity of the MOU, since the record was not complete at that time and the parties had not briefed it.

After WDFW issued the April 2009 renewed Asotin grazing permit, Plaintiff WWP filed the second action, No. 09-2-01120-3, which was subsequently consolidated with the first. Because the record before the Court is now complete with respect to both the 2008 MOU and the 2009 Asotin permit, Plaintiffs now seek judicial review and reversal of both those actions.

ARGUMENT

I. WDFW VIOLATED ITS STATUTORY MANDATE AND ACTED ARBITRARILY AND CAPRICIOUSLY IN AUTHORIZING THE 2008 MOU AND 2009 ASOTIN PERMIT.

A. Standards of Review.

Both the 2008 MOU and 2009 Asotin grazing permit are final agency actions properly subject to judicial review by this Court. RCW 34.050.570(4). The Administrative Procedure Act ("APA") establishes standards for the Court's review of the 2008 MOU and 2009 Asotin permit. RCW 34.05.510 & 34.05.570(1). Under the APA, the Court reviews each agency decision to

determine if it was issued “[o]utside the statutory authority of the agency or the authority conferred by a provision of law,” or is otherwise “[a]rbitrary or capricious.” RCW 34.05.570(4)(c).

“Evaluating whether an agency’s decision was arbitrary and capricious involves evaluating the evidence considered by the agency in making its decision.” *Children’s Hosp. and Medical Center v. Wash. State Dept. of Health*, 95 Wn.App. 858, 871, 975 P.2d 567 (1999). The Supreme Court has explained that agency action is arbitrary and capricious if it is “willful and unreasoning and taken without regard to the attending facts or circumstances.” *Hillis v. State, Dept. of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997).

Courts have explained that the analogous “substantial evidence” standard is violated when an agency fails to conduct a “reasoned process,” evaluating the science it relies upon, or comparing it “to any other resources, such as science available from state or federal agencies or [Tribes].” *Ferry Cty. v. Concerned Friends of Ferry Cty.*, 155 Wash.2d 824, 837, 123 P.3d 102 (2005). The standard is also violated when an agency fails to “explain[] the reasons for its departure” from prevailing science. *Whidbey Env’t Action Network v. Island Cty.*, 122 Wash.App. 156, 173, 93 P.3d 885 (2004). Moreover,

[a]lthough we must give due deference to the “specialized knowledge and expertise of the administrative agency,” *Hayes v. Yount*, 87 Wash.2d 280, 289, 552 P.2d 1038 (1976), such deference does not extend to agency actions that are arbitrary, capricious, and contrary to law.

Children’s Hosp., 95 Wn.App. at 871.

B. The Challenged Actions Were Arbitrary, Capricious, And Contrary To WDFW’s Statutory Mandate.

To determine whether an agency “acted outside of its authority or in an arbitrary or capricious manner, it is necessary to understand its responsibilities.” *Hillis*, 131 Wn.2d at 383.

Here, WDFW’s statutory mandate requires that it “shall preserve, protect, perpetuate, and manage

the wildlife” of the state, and “conserve the wildlife . . . in a manner that does not impair the resource.” RCW 77.04.012 (emphasis added). Indeed, WDFW was created to “focus existing funds for the greatest protection of [fish and wildlife] species and stocks.” RCW 43.300.005 (emphasis added). The agency’s mission statement is to “serve[] Washington’s citizens by protecting, restoring and enhancing fish and wildlife and their habitats, while providing sustainable fish and wildlife-related recreational and commercial opportunities.” *Asotin AR 3457* (management plan).

As the discussion above establishes, virtually all evidence before the agency here indicated that wildlife and fish species and habitat would be harmed – not preserved and protected – by WDFW’s authorization of livestock grazing in State Wildlife Areas under the 2008 MOU and the 2009 Asotin permit. Indeed, the Court will search the record in vain for any actual site-specific evidence showing that the “pilot” grazing served to enhance the State Wildlife Areas’ fish and wildlife resources in any way.

By contrast, there is an avalanche of documents in the record indicating that the grazing has caused negative impacts to fish and wildlife and their habitats on State Wildlife Areas – only some of which are described above. And the majority of these are from the agency’s own scientists.

WDFW acted arbitrarily and capriciously when it failed to provide any reasoned analysis for casting aside this avalanche of information and rejecting its scientists’ opinions and suggestions, in favor of the politically-motivated insistence that grazing would benefit the environment.

For example, there is no evidence to support WDFW’s assertion, in the 2009 Asotin permit, that grazing would enhance deer and elk habitat. To the contrary, as discussed above, the record shows that agency biologists repeatedly advised WDFW for two years that this purported goal simply did not make sense and was not being achieved; and that in fact, the grazing was harming

elk and deer in numerous ways, such as damaging the native plants they rely upon and disturbing elk calving. And this was with a governing management plan specifying that “[t]he forage nutrition needs of wildlife will be allotted first, and where appropriate (i.e. no rare or listed plant/fish/wildlife species impacted, no environmental concerns present such as highly eroded soils, etc.), surplus forage will be considered for use in grazing permits that can be shown to benefit wildlife.” *Asotin AR at 3538* (emphasis added). Yet WDFW provided no reasoned explanation for rejecting its biologists’ advice; and indeed blatantly contradicting its own management plan by disregarding the needs of wildlife and grazing in areas of listed species and steep, erosive soils.

Neither is there any explanation for why WDFW managers rejected the scientists’ repeated statements that permitting livestock to consume 50% of plant growth, and even more in areas dominated by weeds or near livestock projects, lacked biological justification and was harmful to wildlife. There is likewise no explanation for WDFW’s decision to continue to permit grazing between May 15–July 15, disregarding the Wildlife Biologists’ repeated statements that this must not occur to avoid impacts to calving elk. *E.g. Asotin AR at 6, 24*. There is no explanation for rejecting agency and outside scientists’ calls for caution in constructing miles of new fencing and numerous water developments. The agency simply built more and more developments every year, with no analysis whatsoever. And there has never been an analysis of weed spreading.

Instead, the record shows that WDFW managers ordered the grazing to curry favor with the livestock industry, regardless of impacts on wildlife. This is evidenced by the biologists’ reference to the “political pressure” they were under; their repeated comments about being ostracized; the many private meetings between WDFW and the livestock industry; and Manager Dice’s outright irritation at his biologists for voicing concerns. *See e.g. Asotin AR 2665* (biologist concerns are a

“headache”) & 20 (“[w]e’ve been directed to implement this project”). When a Wildlife Area Manager becomes upset about the discovery of ESA-listed bull trout in a stream, presumably because it may impede livestock grazing, something has gone terribly wrong. *Asotin AR at 1437*.

For these reasons, WDFW’s actions were “willful and unreasoning and taken without regard to the attending facts or circumstances.” *Hillis*, 131 Wn.2d at 383. As in *Ferry County*, where a county plan was rejected for failing to provide a reasoned process to justify its listing of special status species, while rejecting WDFW biologists’ recommendations to include more species; here, WDFW likewise provided no reasoned process in rejecting its own biologists’ recommendations. *Ferry County*, 155 Wn.2d 824, 829–30. Nor did it compare the science it relied upon (if any) to science available from other agencies or the Nez Perce Tribe, *id.* at 837, or explain the reasons for its departure from prevailing science. *Whidbey Env’tl Action Network*, 122 Wn.App. at 173. As the record here shows, WDFW managers willfully refused to ensure that their decisions allowing livestock grazing in State Wildlife Areas are consistent with the best available science – and there is likewise no evidence of a reasoned process to justify their rejection of the scientific objections and concerns raised by WDFW scientists and by Plaintiffs.

Additionally, this same evidence shows that the challenged actions are “[o]utside the statutory authority of the agency.” RCW 34.05.570(4)(c). As noted, the statutory authority of the agency limits it to activities that “do not impair the resource.” RCW 77.04.012. But as detailed above, virtually all evidence available to the agency indicated that its grazing pursuant to the 2008 MOU and 2009 permit would impair and degrade the resources of the Asotin Wildlife Area. As a result, Defendants have allowed livestock grazing to damage fish and wildlife habitat in the Wildlife Area, and continue to authorize grazing that will foreseeably continue such harm. Defendants have thus breached their statutory mandate to preserve and protect state wildlife

resources; and have acted in an arbitrary and capricious manner, thus requiring reversal of the 2009 MOU and 2009 Asotin permit.

II. WDFW VIOLATED SEPA.

In addition, the 2008 MOU and 2009 Asotin permit should be reversed as being arbitrary, capricious, and contrary to law under the APA, RCW 34.05.570(4)(c), because of Defendants' SEPA violations. Again, WDFW did not conduct any public environmental review under SEPA before approving the initial or revised MOU, or any of the grazing permits in the Asotin Wildlife Area, despite the abundance of information indicating the grazing had significant environmental impacts. This violated SEPA, as explained below.

A. Standard of Review.

The Court reviews WDFW's decision to authorize the MOU and 2009 permit without any SEPA analysis using the "clearly erroneous" standard of review. *Clallam Cty. Citizens for Safe Drinking Water v. Port Angeles*, 137 Wn.App. 214, 224–225, 151 P.3d 1079 (2007). "A finding is clearly erroneous when, although there is evidence to support it, we are left with the definite and firm conviction that a mistake has been made." *Id.* (citation omitted). In determining whether a "mistake has been made," the court must consider all of the evidence in the record in light of the public policies supporting the law being applied. *Norway Hill Preservation and Protection Assn. v. King Cty. Council*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976). The scope of review of agency SEPA determinations of "no environmental significance "is extremely broad" and requires consideration of the "public policy and environmental values of SEPA." *Sisley v. San Juan Cty.*, 89 Wn.2d 78, 84, 568 P.2d 712 (1977). WDFW does not receive deference in interpreting SEPA, as Department of Ecology is the agency charged with administering SEPA; and "deference to agency interpretation of a statute is appropriate only where (a) the statute is ambiguous and (b) the agency

is charged with its administration and enforcement.” *Seattle Bldg. and Const. Trades Counc. v. Apprenticeship and Training Counc.*, 129 Wash.2d 787, 799, 920 P.2d 581 (1996) (citations omitted).

B. SEPA’s Requirements.

SEPA was adopted to ensure that state agencies evaluate – and disclose to the public – the likely environmental consequences of their proposed actions; “to promote efforts which will prevent or eliminate damage to the environment” and “to enrich the understanding of the ecological systems and natural resources important to the state and nation.” RCW 43.21C.010. To implement these goals, SEPA includes action-forcing provisions: state and local “governments [are required] to fully consider environmental and ecological factors when taking actions that significantly affect the quality of the environment.” *PUD No. 1 of Clark Cty. v. Pollution Control Hearings Bd.*, 137 Wn.App. 150, 158, 151 P.3d 1067 (2007); RCW 43.21C.030.

SEPA mandates a “look before you leap” approach. State agencies must conduct environmental review before pursuing major action that may significantly affect the environment. *Stempel v. Dept. of Water Resources*, 82 Wn.2d 109, 117–118, 508 P.2d 166 (1973). Thus, SEPA encourages starting environmental review at the earliest opportunity. *Klickitat Cty. Citizens Against Imported Waste v. Klickitat Cty.*, 122 Wn.2d 619, 646, 860 P.2d 390 (1993) (citing WAC 197-11-055, 406); and is designed to “serve as the means of assessing the environmental impact of proposed agency action, rather than justifying decisions already made.” WAC 197-11-402(10).

To implement this statutory mandate, SEPA establishes a two-step process whereby agencies first make a “threshold determination” of whether a proposed action may have significant environmental impacts; and if so, then the agency must prepare a detailed Environmental Impact

Statement (EIS) to study those impacts. *See* RCW 43.21C.030; WAC 197-11-310(a). *See also* *Dioxin v. PCHB*, 131 Wash.2d 345, 352, 968 P.2d 159 (1997).

SEPA requires that an EIS “shall be prepared [for] major actions having a probable significant, adverse environmental impact.” RCW 43.21C.030(2)(c), 031. In determining whether an action meets this standard, the reviewing agency’s threshold determination must consider the environmental impacts of the project, which includes short-term, long-term, direct, and indirect impacts. WAC 197-11-060(4)(c), (d). Significant probable environmental effects are indicated if a project may adversely affect “environmentally sensitive or special areas”; if it may “adversely affect endangered or threatened species or their habitat”; or if it may “establish a precedent for future actions with significant effects.” WAC 197-11-330(3)(e)(i), (ii), (iv).

C. The 2008 MOU and 2009 Asotin Permit Posed Significant Adverse Impacts.

The record demonstrates that WDFW was aware that the impacts of the 2008 MOU and the 2009 Asotin permit would have probable significant and adverse impacts—in light of the documented impacts from the 2006–2008 grazing seasons. In fact, key WDFW staffers, including the Lands Division Manager and the Wildlife Area Manager, admit in the record that SEPA analysis was necessary on the 2009 permit.

The pilot grazing project has transformed the Asotin Wildlife Area from an area for wildlife to one laced with miles of barbed wire and electric fences, pipelines, watering troughs and tanks, increasing amounts of weeds, and denuded “sacrifice” areas. Specifically, several SEPA significance factors were triggered by opening the Asotin Wildlife Area to commercial grazing, via the MOU and permit. The project plainly may adversely affect “environmentally sensitive or special areas,” WAC 197-11-330(3)(e)(i): the land is a State Wildlife Area; much of which was acquired with funding from BPA as “fish and wildlife mitigation lands”; and it contains steelhead

critical habitat as designated under the ESA. The project may “adversely affect endangered or threatened species or their habitat,” WAC 197-11-330(3)(e)(ii): the project area contains three ESA-listed fish species sensitive to sediment and other impacts from grazing, as well as protected plants, including the ESA-listed Spalding’s catchfly, to which grazing poses one of the most serious threats. And the project was designed to establish a “precedent for future actions with significant effects,” WAC 197-11-330(3)(e)(iv): hence the name “pilot project.”

As summarized above, the record is replete with documents from scientists warning about the probable, and actual, impacts of livestock grazing upon the steep slopes of the Wildlife Area: upon fish, wildlife, plant, soil, and water resources. When it authorized the January 9, 2008 MOU, WDFW knew it would have probable significant impacts, just as the prior, virtually identical version had. The agency consistently stated that the MOU led directly to the pilot grazing. *E.g.* *Asotin AR at 50* (2007 plan stating purpose was to fulfill requirements of MOU). In addition to the presence of at least three significant factors noted, the agency possessed unrefuted documentation that significant impacts resulted from the 2006 and 2007 grazing, such as 80% livestock utilization of riparian zones containing ESA-listed fish and the construction of many new fences and water developments. *Asotin AR at 284–85*. Likewise, when it authorized the 2009 Pintler permit, WDFW knew of additional impacts from the 2008 grazing, such as utilization rates far above standards, a blowout of sediment into ESA-listed fish habitat, and the discovery of many Spalding’s catchfly plants. WDFW’s failure to prepare an EIS to analyze these impacts, or even conduct a threshold determination, violates SEPA’s mandate. RCW 43.21C.031.

In fact, key WDFW staffers admitted SEPA analysis was needed for the 2009 Pintler permit. Lands Division Manager Jennifer Quan stated in a May 2008 email that “since the Pintler piece will be done this year – there are questions about what happens to it. . . . out[si]de the pilot

we will need to do SEPA (more time and \$).” *Asotin AR at 1068*. Manager Dice noted in May 2008 that “[t]o move to further grazing [sic] in Pintler we would need to do SEPA.” *Asotin AR at 4021*. One of the many sets of meeting notes for meetings between WDFW and WCA stated that the group had a “[d]iscussion on future of the Pintler Creek Pasture: Is the WDFW [] going to continue as a regular grazing permit [-] a full SEPA will be required.” *Asotin AR at 1070*. The WCA stated the same in a 2007 email in which its vice president explained that “[a]t the conclusion of the three year period . . . [i]f the WDFW decides to continue grazing on the pastures that are involved in the Pilot Grazing Program the WDFW will complete a full SEPA and the pasture will then go out for bid.” *Asotin AR at 290*. And yet no SEPA analysis occurred when grazing was authorized for another three years in 2009.

D. No Categorical Exemptions Apply.

Nor can WDFW rely on any of the SEPA categorical exemptions to excuse its compliance with SEPA, as it unsuccessfully attempted to do in the prior round of this litigation. The first and foremost defect with such a defense is that WDFW never invoked such an exemption in its decisions. This renders any invocation of a categorical exemption a post-hoc argument made by counsel—not supported by the record as required in APA review. *See* RCW 34.05.476(3).

Furthermore, none of the exemptions could apply. SEPA rules provide an exemption from SEPA analysis for two types of grazing authorizations, as follows: “Issuance of new grazing leases covering a section of land or less; and issuance of all grazing leases for land that has been subject to a grazing lease within the previous ten years.” WAC 197-11-800(24)(a). This exemption cannot apply because WDFW admits that prior to 2006, livestock grazing had not been permitted on the Pintler Creek area since at least 1990. *Asotin AR at 342* (2007 status report). Thus, the Pintler lands were not subject to a grazing lease for the previous 16 years; and SEPA analysis was

plainly required when the grazing activities commenced. WDFW's failure to conduct SEPA analysis at that time was a violation of SEPA, rendering the prior permits void or *ultra vires* action which cannot now be relied upon.

SEPA rules also provide an exemption for “[b]asic data collection, research, resource evaluation, requests for proposals (RFPs), and the conceptual planning of proposals.” WAC 197-11-800(17). This exemption also could not apply. The 2008 MOU itself states that its purpose is to establish grazing projects that could “*demonstrate the benefits to fish and wildlife*” from grazing, *MOU AR at 38* (emphasis added)— suggesting the project was designed to prop up a predestined outcome, not actually investigate impacts. The Asotin grazing was ongoing for several years before WSU became involved. Even the 2009 Pintler plan states that the “research study plan” was not even available until “later this spring.” *Asotin AR at 3355* (plan). WDFW managers regularly dismissed the concerns of their scientists. The livestock industry has been given “oversight” over the project, *id. at 3374*, and selects the rancher. *MOU AR at 40* (MOU). A post-hoc attempt to recast the grazing as scientific “research” would be misleading.

Application of an exemption would provide WDFW a free pass on its incremental transformation and degradation of the Asotin Wildlife Area. But the Supreme Court has noted, in a discussion with remarkable application to the pilot grazing program, that the failure to conduct environmental review:

may begin a process of government action which can ‘snowball’ and acquire virtually unstoppable administrative inertia. . . . Even if the adverse environmental effects are discovered later, the inertia generated by the initial government decisions (made without environmental impact statements) may carry the project forward regardless. When the government decisions may have such snowballing effect, decision makers need to be apprised of the environmental consequences *before* the project picks up momentum, not after.

King Cty. v. Boundary Review Bd., 122 Wn.2d 648, 664, 860 P.2d 1024 (1993) (citation omitted).

With its multi-year monitoring contract with WSU and its construction of an extensive livestock infrastructure on the land, WDFW has effectively committed itself to further grazing, showing it has allowed its grazing program to snowball far past the point at which SEPA analysis was needed. WDFW must now halt the snowballing and prepare an EIS. The agency's failure to prepare an EIS to analyze these impacts, or even conduct a threshold determination, violates SEPA.

CONCLUSION

WDFW acted arbitrarily and capriciously in disregarding its own scientists and violating its statutory mandate. WDFW also violated SEPA by failing to conduct a threshold determination or EIS as required under SEPA; and no categorical exclusions apply. Accordingly, the Court should rule in Plaintiffs' favor, and reverse the January 9, 2008 MOU and April 8, 2009 Asotin grazing permit.

Respectfully submitted this December 19, 2009,

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